

Mountaineer Steel, Inc. and International Union, United Mine Workers of America, AFL-CIO and United Mine Workers of America, Local 1582, AFL-CIO. Cases 9-CA-34103-1 and 9-CA-34103-2

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND BRAME

On November 12, 1997, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings¹ and conclusions² and to adopt the recommended Order as modified.³

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Further, the Respondent, in its brief, contends that some of the judge's credibility findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the contention is without merit.

In adopting the judge's credibility resolutions with respect to Perry Miller, Member Brame does not rely on the judge's discussion of Miller's reaction to the hiring of Ronald Caudil after the discussion of the need for layoffs in sec. IV.B.g of her decision.

² Member Brame disagrees with the judge's finding in sec. IV.B.a of her decision, that Shop Foreman Grover Chamber's comment to employee Williams that, "I thought you was [sic] a union radical and now I know you are" violated Sec. 8(a)(1) by creating the impression of surveillance. He notes that the General Counsel did not allege that the comment constituted an impression of surveillance, but only that the statement was an "accusation." Further, Member Brame does not find that the facts here would lead employees reasonably to infer that the Respondent was covertly observing their protected activities. As the judge found, some employees were discussing the Union while they ate lunch in the shop, when Foreman Chambers rounded a corner and made the comment at issue. Member Brame notes that an 8(a)(1) impression of surveillance violation will lie only when an employer's "willful conduct" gives the employees the "justifiable impression" that their union activities are under surveillance. *NLRB v. Typographical Union*, 452 F.2d 976, 978 (10th Cir. 1971).

Contrary to the judge, the first part of the Chambers' comment, "I thought you was a union radical," falls well short of implying covert surveillance of Williams' union activities; indeed the tenor of the remark is that Chambers had only a suspicion of Williams' sentiment, plausibly stemming from a rumor or a report volunteered by a fellow employee. The second part of Chambers' statement, "and now I know you are" reflects a remark based on inadvertently overhearing a conversation involving Williams, carried on openly in the shop, and thus would not convey an impression of surveillance.

³ We shall modify the judge's recommended Order to include a provision inadvertently omitted by the judge requiring the Respondent to cease and desist from laying off or otherwise discriminating against employees because of their union support or activities.

Contrary to Member Brame, we agree with the judge that the Respondent created the impression of surveillance when Foreman Grover Chambers accused employee Ronnie Williams of being a "union radical." Specifically, the judge found that on July 29 or 30, 1996, before the union meeting on July 31, 1996, Williams was eating lunch in the shop area and was talking about the Union with other employees. Chambers walked around a corner and said to Williams, "I thought you was [sic] a union radical and now I know you are."

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance. *United Charter Service*, 306 NLRB 150 (1992).

The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. . . . Further, the Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means. *Id.* at 151.

Applying these principles here, we agree with the judge that Chambers' direct, personal reference to Williams' union sympathies would reasonably lead Williams to believe that his protected activities were under surveillance. As the judge pointed out, the first part of the statement ("I thought you was [sic] a union radical") reasonably suggested to Williams that Chambers had spent some time in the past closely monitoring the degree and extent of Williams' union activities. The second part of the statement ("and now I know you are") reasonably suggested to Williams that Chambers had been listening to Williams' lunchtime conversation about the Union with his coworkers. There is no record evidence of a legitimate purpose for making the statement. Accordingly, we adopt the judge's finding that Chambers' statement created the impression of surveillance of Williams' union activities and violated Section 8(a)(1) of the Act.⁴

⁴ Although the complaint alleges that Chambers' statement constitutes a violation of Sec. 8(a)(1), our dissenting colleague "notes" that the complaint does not specifically characterize the statement as creating the impression of surveillance. We agree with the judge that the impression-of-surveillance issue "was sufficiently raised by the pleadings and fully litigated at the hearing," and the Respondent does not contend otherwise.

With respect to the merits, Member Brame, citing *NLRB v. International Union*, 452 F.2d 976, 978 (10th Cir. 1971), applies a different test, one requiring "willful [employer] conduct" that gives employees a "justifiable impression" that their union activities are under surveillance. The dissent then misapplies this test by attempting to construct an innocent explanation for Chambers' comment when, in fact, none was communicated to Williams. Even under the dissent's test, properly applied, a violation has been established. The "willful conduct" is the statement Chambers made to Williams and, for the reasons set forth

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mountaineer Steel, Inc., Accoville, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 1(a) and reletter the subsequent paragraphs.

“(a) Laying off or otherwise discriminating against employees because they support or engage in union activities.”

Deborah Jacobson, Esq., for the General Counsel.
Forrest Roles, Esq. and *Christopher Slaughter, Esq.*,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Charleston, West Virginia, on May 19, 20, and 21, 1997. The consolidated complaint, which issued on December 10, 1996,¹ was based on unfair labor practice charges filed on August 13 and 21 and October 18, 1996, by the International Union, United Mine Workers of America, AFL-CIO (International) and by the United Mine Workers of America, Local 1582, AFL-CIO (Local 1582) (collectively the Union) against Mountaineer Steel, Inc. (Respondent).

The complaint alleges, and Respondent admits, that in August 1996, 14 employees were laid off. The General Counsel maintains that these employees were laid off because they had attended a union meeting on July 31 and signed union authorization cards. Respondent defends by claiming that the employees were laid off due to lack of work and poor work performance. Respondent also argues that the signing of the authorization cards constituted an attempt by employees to enforce an illegal union-security clause, and was therefore unprotected activity.

The complaint further alleges that in July and August, Respondent threatened and interrogated employees, and Respondent denies these allegations.²

FINDINGS OF FACT

I. JURISDICTION

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits and I find that the International and Local 1582 are each labor organizations within the meaning of Section 2(5) of the Act.

above, it would reasonably tend to give him a “justifiable impression” that his union activities were under surveillance.

¹ All dates are in 1996 unless otherwise indicated.

² The General Counsel amended the complaint at the commencement of the hearing to include an additional allegation of interrogation by Harry Chambers in August 1996. In her brief, the General Counsel moved to withdraw the allegation as unsupported by the testimony, and the motion is granted.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent, which is engaged in the repair and maintenance of coal mining equipment, performs work at customer sites in the Charleston area and also maintains a shop and office complex in Accoville, West Virginia. Many of Respondent's customers are signatory to the National Bituminous Coal Wage Agreement with the Union which provides for three successive 2-week vacation periods, called miners' vacation. Because the mines do not operate during the vacation periods, it is an opportune time for machinery and equipment to be repaired, and miners' vacation is Respondent's busiest time of the year. In 1996, Respondent performed on-site repair work for Hobet Mining Company during the first 4 weeks of miners' vacation, from June 22 to July 20: the first 2 weeks at Hobet's Dal-Tex mine, and the second 2 weeks at Hobet's Mine 21.

Roy Stanley is Respondent's president and Grover Chambers (Grover) is the shop foreman. Harry Chambers (Harry) was Respondent's field foreman until September when he founded and became president of Federal Welding Service, Inc. (Federal Welding), a company which is engaged in the same business as Respondent in the same geographic area.³ Federal Welding is party to a collective-bargaining agreement with the Union, whereas Respondent's employees are not represented by any labor organization.

Respondent employs machinists, welders, truckdrivers, mechanics, general laborers, and office clericals. Initial pay rates are set by Stanley and are based solely on the level of skill an employee possesses and the quality of his or her work performance. Wage increases are determined by Stanley and are also merit-based. Decisions with respect to hiring, firing, layoffs, and reinstatement are made by Stanley with input from Grover and Harry.

The parties stipulated that in June 1995, Respondent and the Union entered into the National Coal Mine Construction Agreement of 1995 (the 1995 agreement) at a time when the Union did not represent a majority of Respondent's employees in an appropriate unit. The evidence establishes that the agreement was enforced by the parties for only a limited period of time during miners' vacation that year, and was thereafter given no effect. A number of unfair labor practice charges were filed by both Respondent and the Union in 1995 and 1996 with respect to the enforcement of the 1995 agreement, none of which are before me in this case.

³ All three men are admitted by Respondent to be agents and supervisors within the meaning of the Act at all times material herein.

B. The Alleged Unfair Labor Practices

1. June and July 1996: employees learn of the 1995 agreement

Sometime during the summer of 1996, employee Lawrence Kammerer learned about the execution of the 1995 agreement. He obtained a copy of the contract and showed it to several other employees, including Ronnie Williams. Williams contacted Jerry Kerns Jr., president of Local 1582, and obtained a copy of the signature page bearing Stanley's signature. Both Kammerer and Williams testified that they wanted the Union to enforce the terms of the 1995 agreement and it was resolved amongst the employees that they would meet with representatives of the Union to discuss the situation.

Employee Ben Lambert testified that sometime during the 1996 miner's vacation, he was working at Hobet when Jerry Kerns Sr., a union representative, came to the job and spoke with him and other employees, including Terry Wilson, James Chambers (brother of Harry and Grover), and Robert Charcandy. Kerns Sr. asked the employees if they were aware that they were under a union contract. Lambert testified that nobody had too much to say because Harry was present.

2. The events of July 29 or 30

On or about Monday, July 29 or Tuesday, July 30, Williams was eating lunch in the shop area and was talking about the Union with other employees. Grover walked around a corner and came into Williams' view. According to Williams, Grover looked directly at him and said, "I thought you was [sic] a union radical and now I know you are." Williams did not respond. Grover denied making this statement, and testified that he was not in the shop on either day as he was away on vacation in Myrtle Beach, South Carolina.

3. The events of July 31

On July 31, a meeting was held in the outdoor parking lot of Tudor's Biscuit World restaurant, located 2 miles from Respondent's Accoville facility. The meeting took place sometime in the late afternoon, during daylight hours, and approximately 15 to 20 employees from the first and second shifts attended. Present from the Union were Kerns Sr. and Kerns Jr. During the course of the meeting, there was discussion about the adverse working conditions at Respondent's facility, including the fact that employees were frequently called upon to work excessive amounts of overtime. Different employees related incidents of having to work 24 to 26 to 38 hour shifts, without rest. This discussion related, in turn, to the 1995 agreement and to the perception that Stanley was failing to live up to its terms. Kerns Sr. told the employees that the Union was willing to represent them and was in a position to enforce the contract. In an affidavit given by Kerns Jr., he explained that "we discussed how the Company had signed the union contract. The employees said they wanted the Union to enforce the contract. That's when we handed out the cards and employees signed them."

The union representatives distributed a form captioned "United Mine Workers of America, Checkoff Authorization Form." Preprinted language and a signature line appeared at the top of the form which provided authorization to an employer to deduct membership dues, initiation fees, and assessments from the employee's wages and to remit the money to the Union. The last sentence of the same paragraph further provided, "By my signature, I hereby authorize the United Mine Workers of

America to act as my representative in all matters concerning wages, hours, and other terms and conditions of employment."

Sixteen employees signed authorization cards at the meeting: Lawrence Kammerer, Ronnie Williams, William Bayless, Ben Lambert, Michael Frye, Marcus Honaker, Walter Steven Mounts, David Lusk, Brian Gibson, Tommy Mullins, Freddie Winger, Sidney Dwayne Stroud, Arnold Vance, Joseph Nelson, John Spence, and Michael Lodato. Two other employees who attended the meeting, Jeffrey Phillips and James Simpkins, took the cards with them and signed them on August 3.

Ronnie Lee Thompson is a security guard employed by Respondent. Thompson testified that sometime on July 31, Stanley told Thompson that there were going to be layoff interviews on August 2 and he asked Thompson to attend.

4. Alleged interrogations and threats by Grover and Harry

Simpkins testified that Grover told him that he had heard rumors about a union and wanted to know if Simpkins knew anything about it. Simpkins told him no. Simpkins could not recall when or where this conversation took place, and Grover denied that he ever had such a conversation with Simpkins.

Kammerer testified that late one evening, sometime between July 31 and August 5, he was getting ready to go home when Grover asked him if he knew how many people signed cards for the Union. Kammerer said he did not know. Grover stated that people who were organizers could be labeled as troublemakers.

Michael Lodato testified that sometime in August, he was operating a drill press in the shop and Grover approached him and stated, "I feel sorry for you guys if this union stuff goes through. I can always get my job back at Smithers. You all will be labeled as organizers and it'll be hard for you to get another job around here."

Lee Hancock and William Sargent, both employees of Federal Welding at the time of the hearing, testified that shortly after miners' vacation, in late July or early August, while they were still working for Respondent at Hobet, Harry stated to them that if anybody signed a union card they would be laid off or fired. Neither Hancock nor Sargent responded. Harry denied making any such statement.

5. The events of August 2

Phillips testified that sometime between the hours of 1 and 4 p.m. on Friday, August 2, he had a conversation with Grover outside of Grover's office in the shop. James Simpkins was present for at least part of the conversation. According to Phillips, Grover told him that he had left for vacation but that his car had broken down and he had to return to pick up his brother's truck. Phillips was not certain whether Grover had finished his vacation at the time of this conversation, or whether he was in the hiatus period trying to find a working vehicle. Phillips testified that Grover said that since he had gotten back, he had heard rumors that employees were going to try to vote the Union in. Grover said that he was aware that there had been a meeting, and he asked Phillips if he had attended the meeting. Phillips said yes. Grover asked him if he were "involved," and Phillips told him that plenty of employees had signed cards for the Union. Grover said he was surprised at a few of the people whom he heard had signed cards. Phillips replied that a lot of people's minds were made up when they saw Stanley's signature on the 1995 agreement. Grover said that it was only a 2-week contract that had applied to steam cleaners working at a single mine. Phillips said that was not the way he heard it, and that there was no such thing as a 2-week

contract. Grover concluded by stating that "if you people want to vote yourselves out of a damn job, go ahead, I can go back to Smithers any day of the week." Simpkins' testimony regarding this conversation was similar to Phillips' testimony. Grover denied that this conversation ever took place, again testifying that he was away on vacation.

On August 2, eight employees were laid off: Williams, Frye, Mullins, Gibson, Mounts, Honaker, Conely, and Caudill. All of the laid-off employees, with the exception of Conely and Caudill had signed cards for the Union.⁴

Williams testified that at the end of his shift, Grover approached him and told him that Stanley wanted to see him.⁵ Williams entered Grover's office, and present were Stanley, Grover, Thompson, and Perry Miller, Stanley's secretary. Stanley handed Williams an envelope and told him that he was laid off. Stanley said that it would probably not amount to much, and there was no reason to go to the unemployment office because he would probably be called back to work on Monday. Stanley stated there would be six or seven more employees laid off that day, and "then, if this stuff don't straighten up, there'll be some more Friday, this union stuff."

Stanley denied making any reference to the Union when he laid off Williams, and testified, similar to Grover, that Grover was not present for the interview because he was on vacation that day. Thompson's and Miller's testimony regarding the Williams' layoff interview was consistent with the testimony of Stanley.

6. Grover's Myrtle Beach vacation

Grover testified that he left for vacation shortly after midnight, Sunday, July 28, with his wife and stepdaughter. They were en route to Myrtle Beach when Grover's new car began acting up. Grover turned around and returned to West Virginia. He borrowed his brother Harry's truck, and set out again for Myrtle Beach, at around 10 a.m. on July 28. The family stayed at the Holiday Sands North Hotel in Myrtle Beach from Sunday night through Thursday night. Grover drove back to West Virginia on Friday, August 2 and arrived back at his home at around 7 p.m. At around 8 p.m. Grover received a phone call from Harry who was experiencing difficulties at a jobsite. The two brothers spent most of the next 3-1/2 hours on the phone discussing Harry's problems. At first Grover testified that Harry needed certain measurements which Grover could recite from memory. On cross-examination, however, Grover conceded that Harry had the measurements all along, and that they spoke for 3-1/2 hours because the superintendent on the job where Harry was working was yelling at him, and Grover needed to calm Harry down.

Judith Chambers, Grover's wife, testified about the family vacation and corroborated Grover's testimony in every respect, including that they stayed at the Holiday Sands North Hotel. She also specifically recalled that Grover spent all evening on August 2 with Harry on the phone because it was her birthday, and she was unhappy that Grover had not bought her a birthday cake.

⁴ Caudill's layoff is not alleged as violative of the Act. The circumstances of his layoff are nevertheless relevant to the issues herein, and are discussed, *infra*.

⁵ Williams' timecard for August 2 reflects that he punched out at about 4:30 p.m.

Bayless testified that a month after Harry hired him to work at Federal Welding, he met Grover at a local Seven Eleven store. Grover asked him if he was upset with him and were they still friends. Bayless said yes, he had no hard feelings. Grover said if he had known there was going to be a meeting at Tudor's that week, he would not have gone on vacation. Bayless recalled Grover returned from vacation on Friday, August 2.

7. The events of August 3

At around noon on Saturday, August 3, Phillips and Simpkins were standing between the main office area and the shop. Stanley approached them and said that he guessed they had heard there had been a layoff. Stanley said he had to hire extra help through vacation and that he had too many people working. He said he didn't have as much money as people thought he did and he never intended on getting that big, nor did he intend to stay that big. Stanley told both Phillips and Simpkins that he did not have any problems with either of their work, but if business did not pick up, there would be another layoff in a week. Simpkins' testimony was corroborative of Phillips' testimony regarding this conversation. Simpkins also recalled that during this conversation, Stanley stated that he could not afford to pay union.

Stanley testified that it was Phillips, not he, who initiated this conversation and that Simpkins was nearby but did not participate. According to Stanley, Phillips stated that he was aware of the layoffs the day before and he wanted to know if there were going to be more layoffs and would he have a job. Stanley told him that there could be more layoffs if work kept slowing down. Stanley denied making any reference to the quality of Phillips' or Simpkins' work.

8. The August 5 layoffs

On the morning of Monday, August 5, Stanley stayed at home. Between 8 and 8:30 a.m. Grover, in the presence of Miller, handed out layoff slips in his office to Kammerer, Bayless, Simpkins and Phillips, all of whom had signed cards for the Union.

9. Respondent's knowledge of union activity

On the second day of the hearing, Stanley testified that he first learned of the July 31 union meeting sometime on August 6 or 7 when three employees, John Spence, Brian Lusk, and Roy Hurst met with him individually. Spence asked Stanley what was going on about the Union and Stanley said he didn't know anything about a union, and that the layoffs were due to lack of work. Brian Lusk asked the same question, and Stanley repeated he didn't know anything about a union. Roy Hurst told Stanley that he had signed a union card because he had been threatened by a fellow employee. Stanley testified, "I told him, I said I didn't want to hear it. I told him I didn't want to hear it. I said, 'that's your business. That is your business.'"

On the morning of the third day of the hearing, Grover was called to testify, and Stanley was not present in the hearing room during his testimony. Grover testified that the first he was aware of any union activity was on August 5 at around 10 a.m. when Michael Lodato came into his office and told him there had been a union meeting. Lodato said that there was a rumor that Stanley had signed a contract in 1995. Grover said he remembered something like that but that he did not have anything to do with it. According to Grover, Lodato asked him if the Company would be able to operate if it was unionized, and Grover said he didn't know because he never worked in a union

shop before. Lodato asked Grover if the Company shut down, what would Grover do and Grover said he would probably go back to his former employer, located in Smithers, because he had a good record with them and he enjoyed his work there. They discussed the fact that none of the shops in the area were unionized and Lodato asked Grover if he thought the other shops would hire Respondent's employees. Grover said he didn't know, but that a company might think twice about hiring someone who was involved with a union. Grover testified that he called Stanley on August 5 and told him about his conversation with Lodato.

On the afternoon of the third day of the hearing, Stanley resumed the witness stand and testified that he first learned of the July 31 union meeting on the afternoon of August 5 when he called the shop and spoke with Grover. Grover told Stanley that Michael Lodato had told him about some union activity. Grover mentioned the 1995 agreement and asked Stanley what was going on. Stanley replied that he did not know what was going on and that this was the first he had heard of any union activity.

10. The events of August 9

On Friday, August 9, Williams, who had been laid off on August 2, went to the office to pick up his final paycheck. He had prepared a written grievance statement concerning his lay-off and he tried to hand it to Grover. Grover refused to accept the paper, stating that this was not a union shop. He told Williams to get off the property and to "tell Jerry Kerns he can kiss my ass."

That same day, a meeting was held between representatives of Respondent and representatives of the Union. Present for Respondent were Forrest Roles, Respondent's counsel, and Stanley. Present for the Union were Kerns Sr., Kerns Jr., and Chuck Donnelly, an attorney. The meeting was convened to discuss the relationship between Respondent and the Union, including the fact that the Union had commenced picketing Respondent at various jobsites shortly after the layoffs. Attempts to work out the terms of a collective-bargaining agreement were not successful.

Kerns Jr. testified that at the end of the meeting, Roles and Stanley stood up to leave. Kerns Jr. heard his father say that he had something for Stanley, and saw him slide a stack of authorization cards across the table in Stanley's direction. Stanley looked at the stack of cards, but did not touch them. At first, Roles stated that they were not going to take the cards, but then he said he would keep them for himself. Roles picked up the cards, and he and Stanley left.

Roles testified that he has been practicing labor law since 1967. At the time of the meeting, Respondent had filed unfair labor practice charges against the Union alleging violations of Section 8(b)(2) of the Act for seeking to enforce a minority contract, and Section 8(b)(4) for engaging in secondary boycott activity. The Union was picketing Respondent's jobsites and it was Roles' hope that the situation could be resolved. There was an attempt to reach agreement on the terms of a collective-bargaining agreement and there was specific discussion about wage rates and to which of Respondent's operations any collective bargaining agreement would apply. Roles testified that it was close to the end of the meeting, but not at the very end, when Kerns Sr. made a display of placing the authorization cards one by one in a pile on the table. He then slid them across the table at Stanley, with the comment, "[T]his is something I want you all to know about." Roles testified as follows: "I did

not believe it in our best interest that [Stanley] have knowledge of the contents of those cards. I picked them up, put them in my briefcase without looking at them or reading them or otherwise getting the knowledge from them. I took them to my office and threw them away, and I never told Mr. Stanley or anyone else about the contents of those cards."

On cross-examination, Roles conceded that he could have slid the cards back across the table without looking at them, but he testified that he did not want to engage in a "shoving match" over the cards which would have ended the ongoing discussion. Roles further conceded that he could have simply left the cards on the table and not touched them at all. Roles admitted that prior to the meeting, he had anticipated that the issue of Respondent's motivation for the layoffs would be discussed, and that a claim of majority status might be made.

Stanley testified that towards the end of that meeting he got out of his chair and was getting ready to leave when Kerns Sr. slid a stack of cards across the table. He saw Roles pick them up, but he was never shown the cards by Roles, nor advised of the names on the cards by Roles.

11. The layoffs of August 9, 13, and 19

On August 9, the same day as the meeting between the Union and Respondent, Dwayne Stroud was laid off. Stroud's timecard for August 9 reflects that he punched out at 4:55 p.m., but the record does not establish whether he was laid off before or after the meeting.

On August 13, Respondent laid off Ben Lambert, and on August 19, Respondent laid off Arnold Vance. A week after Stroud was laid off, Stanley reinstated him because he discovered that after he laid Lambert off, he had "cut down too low."

C. Respondent's Business Justification for the Layoffs

In 1992, Respondent employed 12 employees during miners' vacation, and did not lay any of them off at the conclusion of the vacation period. In 1993, Respondent employed 11 employees during miners' vacation, and laid 1 off at the conclusion of the vacation period. In 1994, Respondent employed 13 employees during miners' vacation, and laid 1 off at the conclusion of the vacation period. In 1995, Respondent employed 30 employees during miners' vacation, and laid 10 off at the conclusion of the vacation period. In 1996, Respondent employed 39 employees during miners' vacation, and laid off 15 employees at the conclusion of the vacation period. Fourteen of these fifteen individuals are alleged by the General Counsel to have been laid off due to their union activities. Respondent asserts that the layoffs were motivated solely by lack of work, and that the selection of who was to be laid off was done on the basis of individual job performance.

1. Lack of work

From late April to June, Stanley hired 15 to 18 new employees in anticipation of the increased workload during miners' vacation. During the 4-week period of the Hobet vacation repairs, Respondent's resources were stretched to the limit. Stanley testified that not only did he have to perform the work at Hobet, but he also had to service his regular customers and employees worked "tremendous" amounts of overtime. Stanley himself spent the entire 4-week period working at the Hobet sites, and every available employee was dispatched to do field work. As a result, a large backlog of repair work developed in the shop.

The Hobet work ended on July 20. Stanley first testified that on Monday, July 22, he assigned all employees, with the exception of Harry's regular field crew, to work in the shop.⁶ He quickly realized, however, that there were too many employees in the shop, and that the backlog was quickly diminishing. He met with Grover at lunchtime on July 22 or 23 to discuss the need for a layoff and to determine which employees should be laid off. Six employees were discussed as possible candidates: Hurst, Honaker, Gibson, Mullins, Williams, and Conely. No final determination was made.

Later in his testimony, Stanley testified that it was not until the following week, when he was running the shop during Grover's vacation, that he made the decision to execute a layoff. On July 29, he spoke with Harry about the idea, and he did not make up his mind whom to layoff until sometime later in the week.

On Friday, August 2, Stanley directed Miller to type layoff notices. Stanley did not keep a copy of any of these notices, and none were made part of the record in this case. Friday was also the regular payday, and at 4:30 p.m., Stanley handed out the paychecks to all employees and gave layoff slips to the aforementioned eight employees.

Stanley testified that he knew on August 2 that more layoffs were necessary, but he wanted to speak to Grover to get his input before he laid off any more employees. According to Stanley, he did not speak to Grover until Sunday, August 4, when Grover called Stanley from a jobsite. Stanley told Grover that there had been a layoff on Friday and that four or five more employees would also have to be laid off. They discussed specific employees, and as a result of this conversation with Grover, Stanley determined to layoff Kammerer, Bayless, Simpkins, and Phillips.

Timecards for the weeks ending June 30 through August 11 were introduced into evidence by the General Counsel. For the week ending July 28, 35 employees worked 685.5 hours of overtime. For the week ending August 4, 29 employees worked 717.5 hours of overtime. For the week ending August 11, 24 employees worked 558.75 hours of overtime. In the week prior to the August 2 layoff, Frye, Mullins, Gibson, Mounts, Conely, and Honaker each worked overtime, ranging from 3.5 to 42.75 hours. In the week prior to the August 5 layoff, Kammerer, Simpkins, Phillips, and Bayless each worked overtime, ranging from 4.25 to 43.25 hours. Thus, 13 of the 14 laid-off employees worked in excess of 40 hours in the week prior to their layoff.

⁶ Harry's regular field crew consisted of six employees: James Chambers, Robert Charcandy, Richard Sampson, Lee Hancock, William Sargent, and Westin Harvey. Occasionally supplementing the regular crew were Ronnie Williams, Fred Wingler, and James Simpkins.

Respondent maintains a job card system for billing and payroll purposes. Whenever a job order is placed with Respondent by a customer, a job card is originated which reflects the date that the order is placed. The job is assigned a number, and every employee that works on the job is listed by name, date(s) worked, and hours worked. Respondent offered into evidence "New Job Card Summaries" which were a series of calculations reflecting the number of hours worked on "new jobs" for the months of June through November 1996. "New jobs" were defined by Stanley as those jobs which originated in that period. All hours worked on the "new jobs" were attributed to the month in which the job was received, not in the month that the work was actually performed. For example, if a new job order was received in June, and the work did not commence until July, all of the hours worked on that job were summarized as new job hours for the month of June. Respondent's "New Job Card Summaries" reflect that in June 1996, 9320 new job hours were recorded; in July 1996, 7250 new job hours were recorded; and in August 1996, 3247 new job hours were recorded.

2. Individual employee performance

Ronnie Williams testified that he was hired in March 1996 as a welder. During the 1996 miners' vacation, Harry observed Williams welding pieces incorrectly. When he corrected Williams, Williams cursed, threw things and walked off the job. The next day, Williams showed up at the shop and told Grover of the incident. Grover called Stanley and Stanley told Grover to put Williams to work in the shop because there was a lot of work to do and he needed every man he could get. After reinstating Williams to the shop, Stanley put Williams' back on the field crew on the night shift. In addition to this incident with Harry, Stanley testified that another reason Williams was laid off on August 2 was because his welding skills were mediocre.

Williams did not deny the cursing incident with Harry, but did testify that his welding skills were better than other employees, that his work never had to be re-done, and that he was called upon from time to time to correct other welders' work. Respondent challenged Williams' assertion that he corrected other welders' work.

Mike Frye did not testify. The evidence establishes that Frye was employed during the 1995 miners' vacation, and was not laid off at the end of that vacation period. He continued to work until he was laid off sometime in early 1996, and he was rehired in April 1996 as a general laborer. Stanley testified that Frye tried to learn welding skills, but was unable to perform as a welder, and he was laid off on August 2 because of poor overall performance.

Tommy Mullins, Brian Gibson, and Marcus Honaker did not testify. All three were hired from a vocational high school in May and June 1996, and according to Respondent's records, they were hired as welder trainees. Stanley testified that they did not have good welding skills and lacked the qualities which he believed were necessary to become long-term employees.⁷

⁷ A fourth student, Roy Hurst, was hired at the same time as Mullins, Gibson, and Honaker, but was not laid off due to his alleged excellent welding skills and work ethic. As previously noted, Hurst volunteered to Stanley that he had signed a union card under duress.

Steven Mounts did not testify. Respondent's records show that Mounts was hired in July 1996 as a welder. Stanley testified that Mounts was not a good welder.

Mike Conely did not testify. Respondent's records show that Conely was hired in June 1996 as a welder. Stanley testified that Conely's welding skills were not up to par and that he had received several complaints from Grover about Conely's absenteeism.

Lawrence Kammerer testified that he was first employed by Respondent in March 1995. He worked during the 1995 miners' vacation, and was not laid off at the end of that vacation period. A former high school teacher and coach, Kammerer was hired as a draftsman to create blueprints for parts which were fabricated in Respondent's shop. In addition, Kammerer costed out jobs, tallied employees' timecards, and submitted the timecards to the office secretary at the end of each week. Stanley testified that Kammerer was hired as a draftsman, but there were many problems with his work. During the first week of miners' vacation in 1996, he made many incorrect measurements. Grover testified that for several days during miners' vacation he put Kammerer in charge of the shop to cover emergency jobs, but he was ineffective in that position as well. Stanley moved him to a welder position after miners' vacation, but he had very poor welding skills. Grover testified that when Kammerer was first employed he did a good job, but he got "terrible" as time went on. Kammerer did not testify regarding the quality of his work or whether there were ever any complaints about his work.

James Simpkins testified that he was hired in December 1994 as a welder. He worked during the 1995 miner's vacation, and was not laid off at the end of that vacation period. Stanley testified that Simpkins' welding skills never improved during the course of his employment and that two customers complained about the quality of his work. Stanley also testified that there were rumors that Simpkins used marijuana on company property together with Bayless and Phillips. Stanley admitted, however, that in February 1995, Simpkins was earning \$8 per hour and was subsequently given a raise to \$8.75 per hour. Harry testified that Simpkins was not a good welder, and that Hobet had complained about his work during the 1996 miners' vacation. According to Harry, Simpkins also had a bad temper and a severe alcohol problem. Harry testified that he suspected Simpkins was drinking on the job, and "a lot" of employees told Harry they did not want to work with Simpkins because of his drinking problem. Harry reported this situation to Stanley and to Grover, but never recommended that Simpkins be discharged.

Jeffrey Phillips testified that he was first hired in June 1995 as a contract laborer doing welding, and was hired as a regular employee in July 1995. He was retained after the 1995 miners' vacation period. Stanley testified that Phillips had mediocre welding skills which never improved during the course of his employment, and that he had spoken to Phillips sometime in early 1996 about his use of drugs and alcohol on company property. Grover also testified that in his opinion, Phillips was slacking off on the job.

William Bayless testified that he was hired in March 1995 as a welder. He worked through the 1995 miners' vacation, and was not laid off at the end of that vacation period. Stanley and Harry testified that when Bayless was "normal" he was a welder of high average quality. Frequently, however, he experienced violent mood swings which resulted in fits of rage, curs-

ing, and throwing objects around the shop. Stanley testified that one time, Bayless "threw a fit" with Grover and quit. Four or five days later he come back, and Stanley gave him his job back. After that incident, he had several more fits of rage, and Stanley talked to him about his behavior. Both Stanley and Harry believed that Bayless had a drug and alcohol problem, and employees asked not to be assigned to work with him. Grover testified that on one occasion, he told Bayless, Simpkins and Phillips that he did not want them "coming in drunk like that. If they'd been out partying all night, they needed to stay at home or give me a call." Stanley testified that he once saw many beer cans behind the shop and he immediately suspected Simpkins, Bayless, and Phillips because they were heard to brag about staying out late at night and partying.

Bayless testified that approximately 5-1/2 weeks after he was laid off by Respondent, he was called by Harry and asked if he would be interested in working for him at Federal Welding under a union contract. Bayless agreed and was hired.

Dwayne Stroud did not testify. Stanley testified that sometime between August 5 and 9, he told Grover that he had to lay off a machinist and that he had selected Stroud because the other machinists were better. Grover agreed and Stroud was laid off on August 9.

Ben Lambert testified that he first worked for Respondent from January to September 1994 when he quit. He reapplied for work in January 1995, and was rehired. He therefore worked during both the 1994 and the 1995 miners' vacations, and was not laid off at the end of either vacation period. Lambert performed machine work, mechanic work, welding, and line boring. Stanley testified that Lambert was a "fairly good" machinist, but that he had a lot of other problems. He had frequent arguments with Grover and several times he left the job without telling anyone where he was going. On one occasion, Stanley testified that Lambert got into an argument with Grover and quit. He came back 2 or 3 days later, asked Stanley for his job back, and Stanley reinstated him. Lambert admitted that he left the job at times, but testified that each time he had gotten permission to leave from Stanley, Grover or Terry Wilson, a senior employee.

In February 1995, Lambert was earning \$12 per hour, and was one of Respondent's highest paid employees. He subsequently received a raise to \$13 per hour. Harry testified that he occasionally worked with Lambert in the field, and in his opinion, Lambert was a good worker with very good skills. Harry further testified that Lambert was one of the best line borers that ever worked for him. Phillips testified that Lambert did 99 percent of the line boring work because he was the best at it. On the other hand, Grover testified that he found Lambert hard to get along with and difficult to supervise.

Lambert was laid off on August 13, 4 days after Stroud was laid off. Several days after Lambert was laid off, Stroud was recalled to work. Stanley testified the reason Stroud was recalled was because after he laid off Lambert, he realized he had cut too low and additional jobs had come in. Stanley also testified that Grover preferred Stroud to Lambert, although Grover had not previously suggested that Lambert be laid off before Stroud.

Arnold Vance did not testify. Respondent's records reflect that Vance was hired in July 1996 as a truckdriver. Stanley testified that prior to the 1996 miner's vacation, he had bought a tractor/trailer to transport large pieces of equipment and he hired Vance as the driver. After working for some period of time, Vance told Stanley that he did not know how to hook a lowboy trailer to the truck, a task which Stanley considered to be elementary to the performance of Vance's job. Stanley testified that since work was slowing down anyway, he laid Vance off. He also testified, however, that he hired a replacement driver.

Ronald Caudill was hired as a welder by Stanley after Grover allegedly left for vacation. His timecard shows that he worked on July 30 and 31 and August 1. According to Stanley, after this brief period it became clear that Caudill was a poor welder, and he laid him off on August 2.

IV. ANALYSIS

A. Respondent's Knowledge of Union Activity

The pivotal issue in this case is when Respondent learned of employees' union activity. The General Counsel maintains that Respondent was aware of the Union's organizing efforts prior to the first round of layoffs on August 2. Respondent maintains, first, that it was not aware of any union activity until after the August 5 round of layoffs had been completed, and second, that at no time was Stanley aware of the identity of those employees who had signed authorization cards.

Ben Lambert testified that it was sometime between June 22 and July 20, during miners' vacation, when Kerns Sr. spoke to employees about the 1995 agreement in Harry's presence. Lambert was an entirely credible witness, who had enjoyed an excellent work reputation with Harry and with his fellow employees. I credit Lambert's testimony and I find that Respondent, through Harry, was aware no later than July 20 that the Union was engaging in an organizing effort amongst its employees.

Further evidence that Respondent was aware that employees were talking about the Union prior to August 2 was adduced through the credible testimony of Ronnie Williams who testified that on July 29 or July 30, Grover walked through the shop, heard Williams talking about the Union, and called him a "union radical."

Phillips and Simpkins also testified credibly that on the afternoon of August 2, Grover told them that he had heard about the July 31 meeting and indicated that he was aware of who had signed authorization cards. He also stated that if the employees wanted to vote themselves out of a job, that was all right with him because he could always go back to work for his former employer in Smithers. It is significant that Grover acknowledged that he used the same phrase, "I can always go back to Smithers," 3 days later when he was talking to employee Michael Lodato. Grover's testimony is corroborative of Phillips' and Simpkins' testimony and is demonstrative of Grover's state of mind and his willingness to openly express his antiunion animus.

Finally, I credit the testimony of Williams that during his layoff interview on August 2, Stanley delivered a very clear message: that Williams was being laid off because of "this union stuff," and that if the situation did not straighten out to Stanley's satisfaction, there would be more layoffs.

Stanley and Grover's denials of any knowledge of union activity until after the August 5 layoffs were not credible, and I

need look no further than the inconsistencies in their testimony to make this determination. Stanley testified on the second day of the hearing that on August 6 or 7, after the first 12 employees were laid off, he had three separate conversations with 3 named employees, each of whom came to him and volunteered information about the Union's organizing efforts. Stanley testified that he told each of these employees that he didn't know anything about a union. On the morning of the third day of the hearing, Grover was called by Respondent and testified that he had told Stanley about the union activity in a phone conversation on August 5. Stanley, who had been present throughout the hearing as Respondent's representative, was absent from the room during Grover's testimony. Later that day, Stanley resumed the witness stand and changed his testimony to coincide with Grover's recollection that they had discussed the Union's organizing efforts on August 5. I make no further observation with respect to this conduct other than to state that it leads me to totally discredit Stanley and Grover's testimony regarding when they first gained knowledge of the Union's activity.

In order for me to credit the testimony of Williams, Phillips, and Simpkins with respect to statements attributed by them to Grover on July 29, 30, and August 2, I must necessarily discredit the testimony of Grover and his wife that they were on vacation in Myrtle Beach at the time these statements are alleged to have been made, and I do so without hesitation. Five employees, Williams, Phillips, Simpkins, Bayless, and Kammerer reported seeing Grover in the shop during the period of time he claimed to have been away on vacation. I found all of these witnesses more credible than Grover. Grover and his family supposedly stayed at a place of public accommodation in Myrtle Beach where, presumably, there exists a record of their stay. Grover made a point during his testimony that he was upset that his new car had broken down en route to Myrtle Beach and that he had to take the car back to the dealer. Yet, no receipt or invoice was produced for the repair of the car. Given Grover's demonstrated lack of credibility throughout this case, I simply do not rely on his, or his wife's, representation that Grover was away from the shop for the entire period from July 28 to August 5. It is entirely possible that Grover was in the shop on July 29 as testified to by Williams, left for Myrtle Beach for a few days, and was back in the shop on August 2 as testified to by Bayless, Phillips, Simpkins, and Kammerer.

Respondent's second argument with respect to the knowledge issue, is that "although [Respondent's] counsel had copies of the authorizations on August 9, it is undisputed that knowledge was not supplied to Roy Stanley" (R. Br. 16). Respondent's argument is contrary to the credible evidence, and ignores the status of Respondent's counsel as an agent of Respondent with both actual and apparent authority to act in Respondent's behalf.

On August 9, Stanley and attorney Roles met with the Kerns Sr., Kerns Jr. and the Union's attorney. Roles, a labor lawyer with 30 years of experience, anticipated prior to the meeting that the Union might well make a demand for recognition based on a card showing of majority status. He also anticipated that the Union would claim that the layoffs had been discriminatorily motivated. Fully cognizable of the significance of the presentation of the authorization cards at the conclusion of the meeting, Roles nevertheless took possession of the cards in the presence of Stanley. Respondent argues that since Roles denied ever telling Stanley who the card signers were, there is no evidence to establish that Respondent had knowledge of the indi-

vidual card signers' identities. I find this argument unpersuasive.

Roles chose his words carefully when he testified he knew that it was not in Respondent's best interest that Stanley have knowledge of the contents of the cards. His failure to specifically deny that he ever looked at the cards prior to throwing them out leads me to conclude that he did, in fact, look at the cards and the names on the cards. I further discredit Roles' testimony that he did not impart this knowledge to Stanley. There was no reason for Roles to take possession of the authorization cards other than to gain information from them. I reject Roles' explanation that he took the cards in order to avoid conflict and to keep the meeting going in view of Stanley's testimony, corroborated by Kerns Jr., that the cards were presented at the very end of the meeting when Roles and Stanley were getting ready to leave. I therefore conclude, contrary to his testimony, that he did tell Stanley the identity of the card signers.

Respondent is also chargeable with the knowledge gained by Roles by his acquisition of the cards under agency principles. During the August 9 meeting, Roles was clearly acting within the general scope of his agency authority as labor counsel to Respondent. The meeting had been convened to resolve the outstanding issues between Respondent and the Union, including pending unfair labor practice charges before the Board, the possible negotiation of the terms of a collective-bargaining agreement, and the cessation of picketing by the Union at Respondent's jobsites. Roles' acceptance of the authorization cards in this context was a undeniable exercise of his actual agency authority. *Acme Bus Corp.*, 320 NLRB 458 (1995); *Batavia Nursing & Convalescent Inn*, 275 NLRB 886 fn. 2 (1985). In addition to his actual agency status, Roles also had apparent authority to accept the proffered cards. It is not disputed that Roles took possession of the cards in Stanley's presence and Stanley did not disavow Roles' actions. By standing next to Roles in silence, Stanley clothed Roles with the apparent authority to accept the cards in Respondent's behalf. *Alleghany Aggregates, Inc.*, 311 NLRB 1165 (1993).

In summary, the evidence establishes that Respondent was aware by July 20 that the Union was engaging in organizing efforts amongst its employees. Respondent was further aware by July 30 that Ronnie Williams was an outspoken union supporter. On July 31, the same day as the meeting at which the employees signed authorization cards, Stanley told his security guard to be available for layoff interviews in 2 days. On the afternoon of August 2, Grover Chambers told employees he knew who the card signers were, and on August 9, Respondent's agent took physical possession of the signed authorization cards.

B. Respondent's Alleged Statements of Animus

1. Calling Williams a "union radical"

The General Counsel alleges in the complaint that Grover's statement to Williams on July 29 or 30, "I thought you was [sic] a union radical and now I know you are," constitutes a violation of Section 8(a)(1). The complaint does not allege this statement to be a threat or reprisal, either express or implied. Nor is Grover's statement alleged to constitute an interrogation or the creation of an impression of surveillance. Rather, the complaint broadly characterizes this statement as "an accusation" which interfered with, restrained, and coerced employees in the exercise of their Section 7 rights.

There is no doubt that this statement establishes Respondent's knowledge of Williams' union activity at a critical time. The issue, however, is whether the statement also constitutes an independent violation of Section 8(a)(1) of the Act. I conclude that it does because it created the impression of surveillance of Williams' union activities. The first part of the phrase, "I thought you was [sic] a union radical," suggests that Grover had spent some time in the past watching Williams' union activities, and the second part of the phrase, "and now I know you are," indicates that Grover had been listening to Williams' lunchtime conversation about the Union. Even though the General Counsel did not specifically allege the creation of an impression of surveillance as the theory of the 8(a)(1) violation, the issue was sufficiently raised by the pleadings and fully litigated at the hearing. *Williams Pipeline Co.*, 315 NLRB 630 (1994); *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990).

2. The interrogation of Simpkins

Simpkins testified that one day Grover asked him if he knew anything about a union, and Simpkins stated no. Simpkins could not recall when Grover asked him this question, and could not approximate the month or year the statement was allegedly made. Although the General Counsel argued at the hearing that this statement related to paragraph 7(a) of the complaint, Simpkins testimony was entirely too vague and I make no finding with respect to this testimony.

3. The threat and interrogation of Kammerer

Kammerer testified that sometime between July 31 and August 5, Grover asked him how many employees had signed cards for the Union and further stated that employees who were organizers could be labeled as troublemakers. Kammerer was unique amongst Respondent's employees in that he was a former high school teacher, and was obviously more educated than many of the other employee witnesses. I was impressed by his maturity and his self-possessed demeanor on the witness stand, and I found him to be a credible witness. Grover maintained that the statement could not have been made because he was away on vacation. In view of the fact that I discredit the vacation alibi, and in view of Kammerer's credible testimony, I find that Grover interrogated Kammerer and threatened him with unspecified reprisals because he had engaged in activities on behalf of the Union in violation of Section 8(a)(1).

4. The threat to Lodato

Lodato testified that sometime in August, Grover approached him in the shop and told him if the union stuff goes through, he could always get his job back at Smithers, and that "you all" will be labeled as union organizers and it will be hard to get another job. I credit Lodato's testimony in its entirety. Lodato had signed a card for the Union on July 31, and at the time of the hearing, he was still employed by Respondent. His willingness to testify against his employer's interest in this case was impressive. Grover admitted during his testimony that he told Lodato on August 5 that if the Company shuts down he would probably go back to his former employer in Smithers. Grover also admitted to telling Lodato that a company might think twice about hiring someone who was involved with a union.

Lodato and Grover's versions of this conversation are very similar, the essential difference being that Lodato testified that Grover approached him in the shop and threatened him, whereas Grover testified that Lodato came to his office and

asked Grover to speculate about the consequences of employees being represented by the Union. I credit Lodato's version over Grover's, and find Grover's statement to constitute a threat of loss of employment in violation of Section 8(a)(1).

5. Threat to Hancock and Sargent

Hancock and Sargent testified that in late July or early August, while they were working for Respondent at one of the Hobet mines, Harry stated to them that if anybody signed a union card they would be laid off or fired. At the time of the hearing, Hancock and Sargent were working for Harry at Federal Welding, and by testifying to Harry's threat, they undoubtedly placed themselves at risk of economic reprisal. This was particularly evident from the testimony given by Hancock, which I credit, that from Saturday evening May 17, 1997, to 2 a.m. on the morning of May 18, 1997, less than 48 hours prior to his testimony in this hearing, Harry called Hancock at his home 28 times. Hancock testified that he answered these calls, which he perceived as harassment, because Harry was his boss. During these calls, Harry told Hancock that he wanted him to sign a statement favorable to Respondent.

The Board has recognized the appropriateness of according enhanced credibility to witnesses testifying under such circumstances. *Oster Specialty Products*, 315 NLRB 67, 72 fn. 9 (1994); *Unarco Industries*, 197 NLRB 489, 491 (1972). I discredit Harry's denial that he made this threat, and I credit the testimony of Hancock and Sargent. Accordingly, I find that Harry's threat of loss of employment violated Section 8(a)(1).

6. Threat and interrogation of Phillips and Simpkins

I credit the testimony of Phillips and Simpkins that they were confronted by Grover in the shop on the afternoon of August 2, interrogated and threatened. Phillips is a young man who was as equally responsive and respectful to counsel for the General Counsel as he was to counsel for Respondent. I found him to be a credible witness. Simpkins was somewhat more cautious and less certain in his recollection of details, but his testimony was generally corroborative of Phillips' testimony, and reliable. As previously noted, I discredit Grover's assertion that he was on vacation at the time of this conversation.

Based on the testimony of Phillips and Simpkins, I find that Grover interrogated Phillips regarding Phillips' attendance and involvement in the union meeting of July 31, and threatened Phillips and Simpkins with loss of employment if they voted for the Union, in violation of Section 8(a)(1).

I also conclude that Grover's statement during this same conversation that he was aware that there had been a union meeting, and his indication that he was aware who had signed cards created an impression of surveillance in violation of Section 8(a)(1). Even though not specifically alleged in the complaint, the issue was sufficiently raised by the pleadings and fully litigated at the hearing. *Williams Pipeline*, supra; *Pergament United Sales*, supra.

7. Threat to Williams

I credit the testimony of Ronald Williams that when he was summoned into the office on the afternoon of August 2, Stanley told him he was laid off and that there would be more layoffs if the "union stuff" did not straighten out.

I discredit the testimony of Stanley, Thompson, and Miller that Stanley made no mention of the Union during Williams' layoff interview. For the reasons previously discussed, I found Stanley to be untruthful in many aspects of his testimony. With

respect to Miller, her bias in favor of Respondent was apparent. On direct examination by counsel for Respondent she was asked if there had come a time when she was asked to participate in layoff interviews, and Miller responded yes. Roles proceeded to ask a series of questions, and used the words "interview" and "layoff interview" a total of nine times in the course of the direct examination. Miller's response to each these questions was responsive and concise. The first question asked on cross-examination by the General Counsel was as follows:

Q. Had you ever been asked to sit in on any interviews between Roy Stanley and any of the employees before the day of these layoff interviews?

A. What do you mean interviews, what do you mean by interviews? If I ever sat in on interviews?

One measure of credibility is the demeanor of the witness throughout his or her entire testimony, during both direct and cross-examination. When a witness is called by one side and is responsive to questions posed on direct examination, but suddenly develops a problem understanding the exact same language and phraseology on cross-examination, I am led to conclude that the witness is hostile to the questioner, and unwilling to concede that which is not in the best interest of the witness proponent. I found Miller to be such a witness. Evidence of Miller's unwillingness to concede any fact adverse to her employer was further adduced during cross-examination when Miller acknowledged that Ronald Caudill had been hired by Respondent after the lunchtime meeting at which Stanley and Grover discussed the need to layoff workers. When this obvious inconsistency was pointed out to Miller, she loyally insisted that she didn't think there was anything unusual about it.

I also discredit Thompson's testimony regarding the Williams' layoff interview. Thompson was a temporary employee at the time of this interview, but was in Respondent's full-time employ at the time of the hearing. Thompson had been told to sit in on the interviews by Stanley no doubt to serve as a corroborating witness to Stanley's version of events. Any suggestion that Thompson was present at the August 2 interviews to serve as security for Stanley is belied by the fact that when Grover handed out the layoff slips on August 5, the only other person present was the secretary, Miller. I assume that Grover's testimony that he thought Miller was there to protect him in case someone hit him over the head was delivered tongue in cheek.

I therefore find that on August 2, Stanley threatened that employees would be laid off if they continued to engage in activities on behalf of the Union in violation of Section 8(a)(1).

C. Respondent's Assertion of Unprotected Activity: Application of *Wright Line*

In all cases alleging a violation of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation, the General Counsel is required, in the first instance, to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the employer has the burden to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Supreme Court has said that a prima facie case requires the General Counsel to prove by a preponderance of the evidence that the employer had a discriminatory intent

that was a substantial or motivating factor in the discharge. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

Respondent argues that General Counsel failed to establish in the first instance that employees were engaged in protected activity because the authorization cards which contained dues-checkoff language were signed at a time when there was no valid union-security clause in effect. This argument is without any foundation in the law, and merits no further discussion.

I therefore turn to Respondent's business justifications for the August 1996 layoffs.

D. Respondent's Business Justification for the Layoffs

1. Lack of work

Stanley testified that he realized he needed to layoff workers by lunchtime on July 23, and that he and Grover met to discuss specific shop employees who should be laid off. Later in his testimony, Stanley testified that it was not until the following week, when Grover was on vacation and Stanley was supervising the shop, that he made the decision to layoff shop employees because there was not enough work to keep them busy. He consulted with Harry, the field supervisor, on July 29 about which employees to lay off, and Harry's only expressed concern was that no one from his field crew be laid off.

Grover also testified to the need to lay off employees on direct examination:

Q. What was the—the result of having that many people in the shop?

A. We were doubling up, tripling up on jobs that was left in the shop through vacation that was in no rush to get out, and we was running out of welding machines and cutting torches and everything for everybody to use. There was just too many people in there.

Q. Was there enough work to be done—to do?

A. The first couple of days there was, you know there was enough to keep everybody busy, but then eventually, you know, you have people just wandering around, sweeping floors, and picking up, and stuff like that.

On cross-examination, Grover reiterated that there was not enough work to keep the employees busy:

Q. That was the week that you had the conversation with Mr. Stanley about needing to have a layoff, right?

A. Yes.

Q. And that was when you said that there were clearly too many people working in the shop. You didn't have enough for everybody to do, is that right?

A. More or less, yeah.

Q. You had people who were just sweeping floors?

A. Yes.

Q. You had people that you didn't have any work to assign to?

A. Yes.

Q. And that was the situation already by Tuesday [July 23] when you had the conversation with Mr. Stanley, right?

A. Yes.

Under persistent cross-examination by the General Counsel using Respondent's timecards, Grover was compelled to concede that many of the employees who worked in the shop during the week beginning Monday, July 22 worked large amounts

of overtime, even though he had earlier testified that there was not enough work for them to perform. Given the opportunity to explain, Grover testified that he misunderstood when the General Counsel asked about everybody in the shop, and that he assumed that all employees were shop employees because they all came into the shop at some point during the work day. The reason that so much overtime was worked that week was because the employees which he had mistakenly characterized as "shop employees" were really working in the field.

Following Grover's testimony, Stanley resumed the witness stand and was cross-examined by the General Counsel using the timecards for the following week. Recall that it was this week that Stanley testified Grover was on vacation and he was supervising the shop and saw the need to layoff shop employees. Stanley was asked to go through the timecards and to identify which employees worked in the shop that week. Stanley testified that he could not remember a single person who worked in the shop, and that the reason he could not remember was because the employees were so busy.

Q. So they were busy?

A. They were working at minesites and, you know, we're working for four or five different customers and plus we had a work load going in the shop and - and I can't recall on August, this week here, exactly where every man was out. I can't do that.

Q. Do you remember any particular employee who didn't have enough to do that week?

A. I can't remember anybody's name.

Whatever viability remained of Respondent's economic defense at the end of Grover's testimony was extinguished by the end of Stanley's testimony. Equally unpersuasive were Respondent's "New Job Card Summaries" which were calculated by Respondent in such a way as to be probative of nothing. Respondent's job card system enables Respondent to account for every hour worked by every employee every day. Respondent chose not to introduce that evidence. Respondent summarized only "new jobs" defined as jobs that originated in the months of June through November 1996, and omitted hours worked on "old jobs" during the same period. There is no evidence whether "new jobs" made up 100% or 1% of Respondent's work load during this period. Further muddying the water, Respondent did not summarize the hours actually worked in any given month, but attributed hours worked to the month in which the new job originated. Out of this morass, Respondent argues in its brief that the new job card summaries demonstrate a dramatic decline in Respondent's workload. They do no such thing.

2. Individual employee performance

Because I conclude that there is no credible evidence to support Respondent's argument of an economic justification for the layoffs, I will only briefly discuss the reasons proffered by Respondent for its individual employee selection.

Respondent had a very lax disciplinary policy prior to July 31. There were repeated occasions when employees, such as Williams, Simpkins, Bayless, and Lambert exhibited fits of rage, cursed at supervisors, threw things on the job, walked off jobs and were thrown off jobs. In every instance they were reinstated by Stanley. Harry testified that Stanley was pretty good about giving employees their jobs back and he gave people a break if they lost their temper. Harry explained that it was understood that people get mad sometimes, and it happened

many times that an employee walked off the job but was put back to work by Stanley. Nor was there ever any form of written discipline because, as Grover described it, they were "just a small town shop . . . pretty much a good ole' boy atmosphere." Apparently, that atmosphere prevailed up until the time employees signed cards for the Union. After that, the same conduct which had been previously tolerated by Respondent constituted poor work performance which justified selection for layoff.

A striking example of the disparate application of discipline before and after July 31 related to three employees, Simpkins, Bayless, and Phillips, who had long been suspected of working on the job under the influence of drugs and alcohol. They were neither disciplined nor discharged for this behavior prior to July 31, despite the fact that other employees requested not to work alongside them. Stanley, Grover and Harry testified that these employees were never discharged because they couldn't "prove" anything. Indeed, Simpkins, whom Harry described as having a "severe" alcohol problem, was given a \$.75 per hour raise prior to his layoff. After July 31, however, the same unprovable behavior was relied on by Respondent as a basis to lay these three employees off.⁸

Frye, Kammerer, Simpkins, Phillips, Bayless, and Lambert were all cited for poor work performance. All of these employees had worked miners' vacation in 1995 and had not been selected for layoff at the end of that vacation period. They were, however, selected for layoff at the end of the miner's vacation in 1996, days after they signed cards for the Union.

Respondent did not offer any independent witnesses, such as job superintendents, to substantiate purported episodes of poor work performance or misbehavior. Nor was any documentary proof introduced to support Respondent's position. In view of the fact that I find the testimony of Stanley, Harry, and Grover to be almost wholly unreliable, there is no credible evidence upon which I can fairly conclude that the employees who were selected for layoff were selected because of poor work performance.

E. Conclusion

Respondent's business justifications for the layoff of 14 employees, lack of work and poor individual job performance, are not supported by the credible evidence. I find that the reason Respondent laid off these employees in August 1996 was because they had engaged in activities in support of the Union, and Respondent's action thereby violated Section 8(a)(1) and (3) of the Act.⁹

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The International and Local 1582 are each a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by Grover Chambers, violated Section 8(a)(1) of the Act

⁸ Bayless, whom Harry testified had a both a drug and alcohol problem, was hired by Harry to work at Federal Welding less than 6 weeks after he was laid off by Respondent.

⁹ Mike Conely was the only discriminatee who did not sign an authorization card. This fact, however, does not alter my finding that his layoff was discriminatorily motivated.

(a) On or about July 30, 1996, by creating the impression of surveillance of an employee's union activities.

(b) On or about July 31, 1996, by interrogating an employee about other employees union activities and by threatening to label as a "troublemaker" any employee who engaged in union activities.

(c) In August 1996, by threatening an employee with loss of employment because employees engaged in union activities.

(d) On August 2, 1996, by interrogating employees about their attendance at and involvement in a union meeting, by threatening them with loss of employment if they voted for the Union, and by creating the impression of surveillance of employees' union activities.

4. Respondent, by Harry Chambers, violated Section 8(a)(1) of the Act in July or August 1996, by threatening employees with layoff or discharge if they signed a card for the Union;

5. Respondent, by Roy Stanley, violated Section 8(a)(1) of the Act on August 2, 1996, by threatening to lay off employees if they engaged in union activities.

6. Respondent violated Section 8(a)(1) and (3) of the Act by laying off the following employees in August 1996:

Ronnie Williams	Lawrence Kammerer
Michael Frye	James Simpkins
Tommy Mullins	Jeffrey Phillips
Brian Gibson	James Bayless
Walter Steven Mounts	Sidney Dwayne Stroud
Mike Conely	Ben Lambert
Marcus Honaker	Arnold Vance

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily laid off fourteen employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of layoff to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Mountaineer Steel, Inc., Accoville, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression of surveillance of employees union activities.

(b) Interrogating employees about their or other employees union activities.

(c) Threatening employees with loss of employment or other reprisals because they engage in union activities.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Ronnie Williams	Lawrence Kammerer
Michael Frye	James Simpkins
Tommy Mullins	Jeffrey Phillips
Brian Gibson	James Bayless
Walter Steven Mounts	Sidney Dwayne Stroud
Mike Conely	Ben Lambert
Marcus Honaker	Arnold Vance

(b) Make the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and within 3 days thereafter notify the above-named employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Accoville, West Virginia facility copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off or otherwise discriminate against employees because they support or engage in activities on behalf of the United Mine Workers of America, AFL-CIO, or any other union.

WE WILL NOT create the impression of surveillance of employees who support or engage in activities on behalf of the United Mine Workers of America, AFL-CIO, or any other union.

WE WILL NOT interrogate employees about their or other employees activities on behalf of the United Mine Workers of America, AFL-CIO, or any other union.

WE WILL NOT threaten employees with loss of employment or other reprisals because they support or engage in activities on behalf of the United Mine Workers of America, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Ronnie Williams	Lawrence Kammerer
Michael Frye	James Simpkins
Tommy Mullins	Jeffrey Phillips
Brian Gibson	James Bayless
Walter Steven Mounts	Sidney Dwayne Stroud
Mike Conely	Ben Lambert
Marcus Honaker	Arnold Vance

¹¹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make the above-named employees whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of

the above-named employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoff will not be used against them in any way.

MOUNTAINEER STEEL, INC.